

CALIFORNIA ENERGY COMMISSION

1516 NINTH STREET
SACRAMENTO, CA 95814-5512



March 1, 2002

Robert Pernell, Commissioner
Presiding Member
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814

**Re: Motion To Compel Responses To Staff Data Requests and Delay Schedule
in the El Segundo Power Redevelopment Project (00-AFC-014)**

Dear Commissioner Pernell:

On February 14 and 19, 2002, Applicant in this proceeding (El Segundo Power II LLC) filed objections to a number of data requests the Energy Commission Staff had timely submitted to the Applicant, in accordance with the Committee's Scheduling Order dated December 4, 2002. Most of the objections pertain to data requests concerning the Applicant's recently filed biological Entrainment Report.

After carefully reviewing the objections, Staff has concluded that it needs to file the attached "Motion To Compel Responses To Staff Data Requests/And Request For Delay Schedule" concerning data requests 135, 136, 137, 139, 140, 141, 142, 145, 153, 154, 155, 156, 157 and 158. Each of these data requests is seeking essential data and/or clarifying information concerning the Applicant's recently filed Entrainment Report, and this information is needed *before* Staff prepares its Supplemental Staff Analysis in this proceeding (now scheduled for release on March 25, 2002).

Staff has tried, and will continue to try to obtain this needed information through direct communications with the Applicant. However, in light of the Applicant's formal objections to these data requests, and the short time-frame currently remaining for issuance of the Supplemental Staff Report, Staff respectfully requests the Committee to quickly grant this Motion to Compel, and to delay the existing schedule for publication of the Supplemental Staff Report for a sufficient time to ensure that Staff can meaningfully consider the answers *before* its Supplemental Staff Report is written.

Thank you for giving timely considering to this Motion.

Sincerely yours,

DAVID F. ABELSON
Senior Staff Counsel

cc: Service List

STATE OF CALIFORNIA

Energy Resources Conservation
And Development Commission

In the Matter of:)	Docket No. 00-AFC-14
)	
Application for Certification)	MOTION TO COMPEL
for the EL SEGUNDO POWER)	APPLICANT'S RESPONSES
REDEVELOPMENT PROJECT)	TO STAFF DATA REQUESTS/
(EL SEGUNDO POWER II, LLC))	AND RELATED REQUEST FOR
)	SCHEDULE DELAY
<hr/>)	

I. INTRODUCTION

A. Background Giving Rise To This Motion

On December 4, 2001, the Siting Committee presiding in this California Energy Commission (CEC or Commission) matter issued its "Committee Schedule" for the remaining phases of this proceeding. Among other things, the Schedule required the Applicant (El Segundo Power II, LLC) to prepare and file an "Impingement and Entrainment Study." The Committee also expressly authorized further discovery concerning the Impingement and Entrainment Study, as well as other specified matters.

On December 28, 2001, the Applicant submitted its "Supporting Analysis of Entrainment and Impingement" (hereinafter the "Entrainment Report"). On February 6, 2002, the CEC Staff issued timely data requests concerning, in part, this Entrainment Report (and remaining questions concerning certain of the Applicant's other recently filed submittals.) On February 14, 2002, the Applicant's attorney filed objections to virtually all of the Staff's data requests concerning the

Entrainment Report. Subsequently, on February 19, 2002, the Applicant's attorney filed additional objections to certain Staff data requests as specified below.

B. Motion To Compel Data Responses And Stay Proceedings

Public Resources Code Section 25519(b) provides that:

The commission, upon its own motion or in response to the request of any party, may require the applicant to submit any information, document, or data . . . that it determines is reasonably necessary to make any decision on the application.

In addition, Title 20, California Code of Regulations (CCR), Section 1716(g) expressly authorizes any party who has been unable to obtain information through data requests to "petition the committee for an order directing the responding party to supply such information."

For the reasons set forth below, the CEC Staff respectfully requests that the Committee direct the Applicant to fully respond to Staff's biological resource data requests 135, 136, 137, 139, 140, 141, 142, 145, 151, 152, 153, 154, 155, 156, 157 and 158. In addition, Staff requests that the Committee stay the Schedule in this proceeding until the requested information has been fully and properly filed with the Commission, and the Staff has had adequate time to evaluate it (as contemplated in original Committee Schedule issued on December 4, 2001).

//

//

//

II. THE DATA RESPONSES ARE ESSENTIAL FOR STAFF TO PERFORM ITS LEGAL RESPONSIBILITIES IN AN EFFECTIVE AND TIMELY MANNER

A. The Biological Entrainment Impacts of the Cooling Water Intake System At El Segundo Are An Issue Of Great Concern In This Proceeding.

The Commission's review of all power plant siting applications are subject to the provisions of the California Environmental Quality Act (CEQA) (Pub. Resources Code § 21000 *et seq.*).¹ In this case, the Applicant is proposing to use an existing once-through cooling water intake structure located in Santa Monica Bay to provide over 200 million gallons per day of cooling water for its power generation project at El Segundo. However, neither the Applicant nor anyone else has ever conducted a complete and current biological entrainment study (such as is typically performed when required to comply with federal Clean Water Act Section 316(b)) at the El Segundo Power Plant intake structure itself. Instead, to support its conclusion of “no significant environmental impacts,” the Applicant’s Entrainment Report relies primarily on data obtained from studies conducted at other times and in other locations (e.g. the Scattergood power plant, the King Harbor study, etc.).

Staff and other participants in this proceeding (e.g. the California Coastal Commission, the California Department of Fish and Game, the National Marine Fisheries Service) are deeply concerned about the absence of a complete and current biological entrainment study at the existing El Segundo intake structure, and have serious questions about the scientific validity of the alternative analysis upon which the Applicant seeks to rely. As the Energy Commission itself has noted in its statutorily required report to the Legislature entitled “Environmental Performance Report of California’s Electric Generation Facilities (CEC Publication # P700-01-001, July 2001)”:

¹ While the Commission's siting program has been certified by the Secretary of the Resources Agency, thereby exempting the Commission from the requirement to prepare an EIR for this project (Pub. Resources Code, § 21080.5; Title 14, CCR section 15251(k)), the Commission is nonetheless subject to all of the policies and requirements of CEQA from which it is not explicitly exempted. (*Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215 [32 Cal.Rptr. 2d 19]).

[D]amage to aquatic biological resources continues at coastal power plant sites using once-through cooling . . . [and] repowering or expanding power plants at existing coastal and bay side sites will perpetuate significant impacts on aquatic ecosystems through the continued use of once-through cooling systems. (*See* Executive Summary at page iii).

In light of California's serious and ongoing concern about existing once-through cooling systems, it is essential for the Staff to fully and accurately understand the data, assumptions, methodologies and conclusions contained in the Applicant's Entrainment Report before Staff prepares its Supplemental Assessment in this matter. Simply stated, Staff has a legal responsibility to independently determine whether the data, assumptions, analyses and/or methodologies utilized in the Applicant's Entrainment Report provide a sound scientific basis for concluding that there will not be any significant adverse environmental impacts from the proposed use of the existing cooling water intake structure.²

B. Staff's Data Requests Seek Essential Data and/or Clarifying Information

As specifically explained below, each of Staff's data requests seeks essential data and/or clarifying information about the Applicant's Entrainment Report, and each of the objections lodged by the Applicant is completely lacking in legal or factual merit. In order to perform its independent evaluation, Staff needs to accurately understand what the Applicant is or is not contending in its recently filed Entrainment Report, and all of Staff's data requests are well within the scope of the "clarifying" discovery expressly authorized by the Committee in its Scheduling Order issued on December 6, 2001.

² As part of its siting process, Commission regulations require Staff to perform an independent analysis of all environmental issues:

The staff shall present its independent assessment . . . of the adequacy of the measures proposed by the applicant to protect environmental quality and to protect public health and safety. (Title 20, CCR, Section 1723.5(b))

The Commission's regulations also state that:

The staff shall review the information provided by the applicant and other sources and assess the environmental effects of the applicant's proposal, the completeness of the applicant's proposed mitigation measures, and the need for, and feasibility of, additional or alternative mitigation measures. (Title 20, CCR., Section 1742.5(a)).

It is particularly important for the Committee to recognize that because of the compressed timeframe remaining for completion of this siting case, no additional workshops have been scheduled by the Committee or Staff *prior* to issuance of the Supplemental Staff Assessment. Therefore, to ensure that Staff does have complete and accurate information on which to base its Supplemental Assessment, it is essential that the Committee require the Applicant to provide responses to the data request, below, before the Supplemental Staff Assessment is written.

Discovery in Energy Commission siting proceedings is intended to ensure that all parties have a complete and accurate understanding of the information supporting other party's positions *prior* to the time of evidentiary hearings. In this motion, Staff is seeking answers to relevant, straightforward questions. Applicant should be required to promptly and fully respond to each of the unanswered data requests before this matter proceeds any further.

1. Staff Data Request 135

Staff is seeking a table showing the *actual* mean densities and variances (not the “transformed” mean densities contained in the Report’s Appendix) of all fish taxa used in the comparison between the 1978 to 1979 King Harbor and Scattergood ichthyoplankton studies (using the same units of density for taxa collected at each location).

Applicant’s Objections To 135 Lack Merit:

Initially, the Committee should note that the Applicant did not object to Data Request 135 in a legally timely manner. Specifically, Title 20, CCR, Section 1716(f) requires all objections to be filed within 10 days of receiving the data request. This data request was served and posted on February 6, 2002; objections were not received until February 19, 2002. The objections to this data request should be rejected as legally untimely, and Applicant should be directed to provide the information which is sought.

Substantively, the Applicant erroneously objects to this data request on the grounds that the *actual* mean densities at these two locations are presented on pages 44 through 67 of the Entrainment Report, and therefore “any party wishing to prepare such a table under these circumstances could do so.” This objection is factually incorrect; there are no data sets showing *actual* densities (with the exception of the discussion on “Atherinopsidae (Silversides)” on pages 44 through 67 of the report. Since the Applicant undoubtedly used such actual density data in performing its “transformation” analysis, Staff is fully entitled to this data and/or all of the “work papers” supporting this Report. Title 20, CCR, Section 1716(j).

Finally, Applicant objects to Data Request 135 claiming it does not establish any clear reason why such information would be necessary or useful under any of the grounds stated in the cover letter for the data requests from James W. Reede to Ronald Cabe. Simply stated, because the Applicant is proposing to use King Harbor plankton densities as a surrogate for El Segundo plankton densities, the *actual* magnitude of the densities is fundamental to the validity of the “transformed” analysis provided in the Entrainment Report. It is a mainstay of the scientific method that scientific reports must contain enough data to enable the independent reader to examine the data and form his own conclusions. Without the actual density data used in the “transformed” analysis, it will be difficult or impossible to independently evaluate the scientific validity of the findings in the Entrainment Report. In addition, without this actual density data the report, as written, may contain serious scientific flaws or misinterpretations. In short, a response to this data request is essential to Staff’s independent evaluation of the Entrainment Report.

2. Staff Data Request 136

In this data request Staff simply asked that the axes of all graphs in Appendix D of the Entrainment Report be clearly labeled using the same density units for all graphs, and that the graphs (in which the seasonality of larval density at King Harbor and Scattergood are compared) use the same density scale for both locations.

Applicant’s Objections To 136 Lack Merit

Applicant initially objected to this data request by erroneously claiming that all graphs in Appendix D already contain the necessary labeling or textual explanations. Applicant now concedes that this objection was not correct (as several graphs in Appendix D do, in fact, lack either axes labeling, legends, or textual explanations), and the Applicant has stated that it will now provide the explanations and textual corrections requested.

However, Applicant still maintains that it would be scientifically “inappropriate” to scale the graphs using the same density units and scales for both the King Harbor and Scattergood locations, although the Applicant has provided no explanation of why this assertion is correct. In short, this objection lacks any legal merit and is simply argumentative and non-responsive to the data request. If the Applicant disagrees with the results requested, it can simply explain this in its data response or in subsequent written testimony.

The data response which Staff is seeking is essential because the Entrainment Report, as currently presented, makes it difficult or impossible to compare the King Harbor and Scattergood data, and yet such a comparison is essential to evaluate the scientific validity of using King Harbor data as a surrogate for data collected directly at El Segundo. Staff is also concerned that by providing the comparative data in different units and different scales, as the Applicant has done, the report may lead to a misinterpretation of the data. Applicant should be required to fully respond to this data request.

3. Staff Data Request 137

In this data request Staff noted that the Entrainment Report states that past studies at Scattergood and El Segundo might not be useful in current analyses given the age of these studies, but goes on to state: “However, the similarity between old and new data was shown to be tractable. (Report, at page 73.)” Staff then asked the Applicant to define what it meant by “tractable,” and to indicate what facts in the report support this statement.

Applicant’s Objections To 137 Lack Merit:

The Applicant has objected to this request claiming that it “does not accurately reflect the report and that the first phrase of the first sentence of the data request is either false or lacks a citation to determine the location and context the quote is taken from.” However, Staff’s data request is based directly on the language clearly cited at page 73 of the Entrainment Report wherein it is expressly states that “The main concern with reliance upon those [El Segundo and Scattergood] studies are their age and the potential for some factors to have changed. However, the similarity between old and new data was shown to be tractable.” While the Applicant has now provided a definition of the word “tractable,” it simply asserts, without specificity, that the entire Entrainment Report supports this conclusion. Staff seeks a more specific answer to its question, but will accept the answer provided if the Applicant is incapable of providing any greater specificity.

4. Staff Data Request 139

In this data request Staff has asked whether the Applicant is contending that the *seasonal* correlation in the abundance of some larval taxa is intended to demonstrate that the *absolute* density of each species of larvae at King Harbor is representative of the *absolute* density of larvae subject to entrainment at the El Segundo Generating Station intake. If so, the Applicant is asked to explain how it reached this conclusion.

Applicant’s Objections To 139 Lack Merit:

The Applicant’s response to this data requests consists of a “boilerplate” objection (which the Applicant then uses over and over again in responding to most of the remaining Staff data requests). That “boilerplate” objection states:

This “data request” is not actually a data request or a question. Instead it appears to be a request for admissions. The questions contained within the “data request” are laden with assumptions that are impossible to separate from the questions rendering them unanswerable. ESP II objects to this “data request” because it does not seek information necessary under any of the five grounds described in the cover letter for the data requests from James W. Reede to Ronald Cabe nor does it seek information necessary to evaluate the project’s compliance with LORS or environmental impacts.

Applicant's boilerplate objection lacks any factual or legal merit. In order to perform its independent evaluation, Staff needs to accurately understand what the Applicant is or is not contending in its Entrainment Report. In this particular request Staff is seeking to accurately understand the data, assumptions and analyses which Applicant is providing in support of its conclusions in the report. This data request is well within the scope of the "clarifying" discovery expressly authorized in the Committee's Scheduling Order issued on December 6, 2001.

Indeed, because of the compressed timeframe remaining for completion of this matter, there are no data request/response workshops scheduled prior to the Supplemental Staff Assessment. Therefore, to ensure that the Staff has accurate information on which to base its Supplemental Assessment, it is essential that the Applicant confirm and/or explain certain contentions which it appears to be making in the Entrainment Report, or clarify that this is not what it is contending. This information is needed before the Supplemental Assessment is written, not at some later date, and Applicant should be directed to promptly respond to this data request.

5. Staff Data Request 140

In this data request Staff asks whether the Applicant is contending in its Entrainment Report that the King Harbor data were collected at water columns comparable to the water columns impacted by the El Segundo intake structures, and therefore that the densities of larvae collected at King Harbor are representative of the densities of larvae subject to entrainment by the El Segundo Generating Station intake. If so, the Applicant is asked to explain how it reached this conclusion.

Applicant's Objections To 140 Lack Merit

Applicant has provided the same "boilerplate" objection discussed in data request 139, above. Please see Staff's response in 139 above. Applicant should be required to promptly answer this data request.

6. Staff Data Request 141

In this data request Staff asks whether the Applicant agrees that (1) the statistical "transformations" (which it used in its Entrainment Report) are normally done to correct problems of non-normal distributions or heteroscedasticity, and (2) high variance is not a reason to log transform data unless the variance varies as a function of the mean. If Applicant agrees with this statement, it is asked to provide a justification for the transformation that was done in the Entrainment Report. If the Applicant disagrees with this statement, it is asked to explain why it disagrees.

Applicant's Objections To 141 Lack Merit

Applicant has provided the same "boilerplate" objection discussed in data request 139, above. Please see Staff's response in 139 above. Applicant should be required to promptly answer this data request.

7. Staff Data Request 142

In this data request Staff asks the Applicant to explain how the statistical “transformation” done in the Entrainment Report corrects for zero (as Applicant asserts that it does).

Applicant’s Objections To 142 Lack Merit

Applicant objects to this data request by stating that “the answer to this request is contained within the background for the data request: the ‘log x+1’ method,” and that any answer beyond this would “require a mathematical explanation of fundamental statistical and logarithmic functions.” Staff has not been able to find the answer in the “background” information that Applicant is referring to. Moreover, without the *actual* densities requested in Data Request 135, above, Staff is unable to determine if this statistical manipulation of the underlying data has been properly performed or not. Applicant should be directed to promptly answer this request.

8. Staff Data Request 145

In this data request Staff asks if the Applicant is contending (as the Entrainment Report suggests) that if the loss of fish caused by the El Segundo power plant is less than 5 percent for each impacted species, the impact is therefore “insignificant”? If so, the Applicant is asked to explain the scientific basis for its conclusion. If not, the Applicant is asked to provide the lowest threshold impact level that it would regard as “significant,” and explain the basis for its conclusion.

Applicants Objections To 145 Lack Merit

Applicant has provided the same “boilerplate” objection discussed in data request 139, above. Please see Staff’s response in 139 above. Applicant should be required to promptly answer this data request.

9. Staff Data Request 151

In this data request Staff notes the established fact (reflected in the Entrainment Report itself) that most of the species at risk of impingement and entrainment at the El Segundo Generating Station intake are most abundant in shallow water (less than 15 meters). Given this fact, Staff asks the Applicant to provide its justification for extrapolating densities to the entire Santa Monica Bay out to 90 meters depth, as it has done in the Entrainment Report.

Objections to Data Request 151

Applicant has provided the same “boilerplate” objection discussed in data request 139, above. Please see Staff’s response in 139 above. Applicant should be required to promptly answer this data request.

10. Staff Data Request 152

In this data request Staff asks the Applicant whether it agrees that since San Diego Bay (referenced in the Entrainment Report) is a calm, semi-enclosed, highly productive bay, it is likely that the standing stocks of pelagic species in San Diego Bay would be higher than in the more open, less productive Santa Monica Bay. If not, Applicant is asked to explain its answer.

Applicant's Objections To 152 Lack Merit

Applicant has provided the same “boilerplate” objection discussed in data request 139, above. Please see Staff’s response in 139 above. Applicant should be required to promptly answer this data request.

11. Staff Data Request 153

In this data request Staff asks the Applicant (with regard to its calculation of source water stock populations by Method 2, based on San Diego Bay data in the Entrainment Report) to provide justification for why the standing stocks in a calm, more southerly, highly productive bay would be the same as standing stocks in the more northerly, more exposed, less productive Santa Monica Bay.

Applicant's Objections To 153 Lack Merit

Applicant has provided the same “boilerplate” objection discussed in data request 139, above. Please see Staff’s response in 139 above. Applicant should be required to promptly answer this data request.

12. Staff Data Request 154

In this data request Staff asks the Applicant if it is contending that plankton tows, unlike otter trawls, are 100% efficient (as it appears in the Entrainment Report). If so, the Applicant is asked to provide the factual basis for its conclusion. If not, the Applicant is asked to provide an adjusted analysis assuming either a realistic ichthyoplankton catch efficiency or 100 percent trawl catch efficiency.

Applicant's Objections to 154 Lack Merit

Applicant has provided the same “boilerplate” objection discussed in data request 139, above. Please see Staff’s response in 139 above. Applicant should be required to promptly answer this data request.

13. Staff Data Request 155

In this data request Staff notes that the cumulative impact analysis presented in Table 6-1 of the Entrainment Report appears to be derived from simply scaling the adult losses at Intake No. 1,

which has a much lower actual impingement loss than the other intakes. The Applicant is asked to provide a cumulative impact analysis which uses *actual* (not projected or proxy) impingement data from each of the other intakes in the analysis.

Applicant's Objections To 155 Lack Merit

The Applicant provides an argumentative and non-responsive objection contending that “adequate cumulative impact analyses have been provided to meet the applicant’s burden and obligation in this area, [and the data request] does not seek information necessary under any of the five grounds described in the cover letter for the data requests from James W. Reede to Ronald Cabe nor does it seek information necessary to evaluate the project’s compliance with LORS or environmental impacts.”

Staff’s data request simply asks for a cumulative impact analysis using *actual* impingement data from the various sources analyzed, rather than “scaled” data derived from the single El Segundo Unit 1 alone. If the Applicant has such direct data, sound science requires that it provide the analysis requested. If the Applicant does not have this direct data, and cannot reasonably obtain it, it should say so, and then explain why “scaling” the Unit 1 El Segundo data is a reasonable proxy for the cumulative impacts of other sources operating in Santa Monica Bay.

14. Staff Data Request 156

This data request asks the Applicant to provide an estimate of the total effect on larval and adult fish populations of all intakes in Santa Monica Bay combined, and to include a discussion of the accuracy of this estimate.

Applicant's Objections To 156 Lack Merit

Applicant has provided virtually the same “boilerplate” objection discussed in data request 139, above. Please see Staff’s response in 139 above. The information which Staff requests is a standard CEQA “cumulative impacts” analysis. The Applicant should be required to promptly answer this data request.

15. Staff Data Request 157

This data request asks the Applicant to provide an accurate record of the actual daily intake volumes of water pumped at each of the El Segundo Generating Station intakes from 1982 to the present time.

Applicant's Objections To 157 Lack Merit

The Applicant objects to this data request by stating that “[m]uch of the information sought by this data request is not known to be in the possession of the applicant at this time.” However, Staff notes that the NPDES permits for the existing El Segundo intake structures require the Applicant to keep the requested records for at least five years, and the Applicant has not claimed

that these legally required records are, in fact, missing. Applicant should be required to promptly answer this request.

16. Staff Data Request 158

This data request asks the Applicant to provide copies of the following documents which are referenced in its Entrainment Report:

- Carline, Robert. December 2001. Fisheries. Vol. 26, #12
- City of Los Angeles Environmental Monitoring Division, Bureau of Sanitation, Department of Public Works. 1993. Marine monitoring in Santa Monica Bay: annual assessment report for the period July 1991 through June 1992.
- Herbinson, K.T. 1981. 316(b) fish impingement inventory. Southern California Edison Company Research and Development Series.
- Holbrook, S., R.J.Schmitt and J.S. Stephens. 1997. Changes in assemblage of temperate reef fishes associated with a climate shift. Ecological Applications 74(4): 199-1310
- MBC Applied Environmental Sciences. 2000a. National Pollutant Discharge Elimination System, 2000 receiving water monitoring report, Scattergood and El Segundo Generating Stations, Los Angeles County, California. Prepared for Los Angeles Department of Water and Power, Los Angeles County, California. Prepared for Los Angeles Department of Water and Power, Los Angeles CA, and El Segundo Power L.L.C., El Segundo, CA.
- MBC Applied Environmental Sciences. 2001. Unpublished fish impingement data from El Segundo Generating Station, 1990-2000.
- Roemmich, D. and McGowan, J. 1995. Climatic Warming and the Decline of Zooplankton in the California Current. Science 267: 1324-1326
- Schlotterbeck, R.E., L.E. Larson, P.Dorn, R.C.Miracle, R.G.Kanter, R.R.Ware, D.B.Cadient, and D.W. Connally. 1979. Physical and biological categorization process for selection of Southern California Edison Company representative 316(b) study sites. Southern California Edison Company Research and Development Series: 79-RD-68. 46 pp.
- Southern California Edison. 1982. Marine Ichthyoplankton Entrainment Studies. Volume II, analysis and interpretation. August 1979-September 1980. Section 316(b) Federal Water Pollution Control Act. Ormond Beach Generating Station, Redondo Beach Generating Station, Units 5&6 and 7&8, San Onofre Generating Station, Unit 1. April 1982. Southern California Edison Company.

Applicant's Objections To 158 Lack Merit

The Applicant objects to this data request by claiming that it seeks copyrighted material (the Carline, Holbrook, and Roemmich articles) for which the Applicant does not own the copyright. This objection is entirely lacking in legal merit. Long-standing judicial doctrine and federal statutory law clearly allows the "fair use" of copyrighted material for non commercial purposes

such as this proceeding.³ Moreover, Applicant cannot credibly assert that it intends to rely on certain copyrighted materials in this proceeding but is unable or unwilling to provide these materials to other participants. If this is what Applicant is contending, simple due process would require that this information be entirely stricken from the record. Applicant should be required to respond to this data request for the benefit of all parties, although Staff has now obtained copies of the three documents which Applicant has refused to provide.

III. CONCLUSION

As noted earlier in this Memo, discovery in Energy Commission siting proceedings is intended to ensure that all parties have a complete and accurate understanding of the information supporting other party's positions *prior* to the time of evidentiary hearings. In this motion, Staff is seeking answers to relevant, straight-forward data requests, and the information it seeks is needed before Staff can complete its Supplemental Staff Assessment in this matter. Applicant should be required to promptly and fully respond to each of the unanswered data requests discussed above. In addition, the Committee should stay the Schedule in this proceeding until the requested information has been fully and properly filed with the Commission, and the Staff has had adequate time to evaluate it (as contemplated in original Committee Schedule issued on December 4, 2001).

March 1, 2002

Respectfully Submitted

DAVID F. ABELSON
Senior Staff Counsel

³ See, e.g., Title 17, United States Code Annotated, Section 107; *Religious Technology Center v. Wollerstein*, 971 F.2nd 364 (9th Circuit, 1992) (holding that documents provided to expert witnesses for purposes of preparing testimony in a state proceeding constituted "fair use" and were not an infringement of copyrights.)